IN THE

Supreme Court of the United States

December Term, 1978

No. 78-859

ARTHUR V. GRASECK, JR.,
Plaintiff-Petitioner,

—against—

ANGELO MAUCERI, Individually and as Administrative Judge of the District Court of Suffolk County; EDWARD U. GREEN, JR., Individually and as a Judge of the District Court of Suffolk County,
Defendants,

JOHN F. MIDDLEMISS, JR., Individually and as Attorney-in-Charge, Legal Aid Society of Suffolk County, New York,
Defendant-Respondent,

RALPH COSTELLO, Individually and as Attorney-in-Charge of the District Court Bureau of the Criminal Division of the Legal Aid Society of Suffolk County, New York,
Defendant,

LEGAL AID SOCIETY of Suffolk County, New York,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities

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The respondents John F. Middlemiss, Jr., Individually and as Attorney-in-Charge, Legal Aid Society of Suffolk

County, New York and the Legal Aid Society of Suffolk County, New York, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion and judgment in this case filed and entered August 1, 1978. That opinion is not reported.

Questions Presented

1. Whether the concurrent findings of fact by both lower courts should be upheld absent a very obvious and exceptional showing of error?

2. Whether the Respondents acted under the color of State Law pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in dismissing petitioner?

3. Whether the holding that the dismissal of petitioner was not under the color of State Law may permit the evasion of the Sixth Amendment duty to provide effective legal representation to the indigent?

Statement of Facts

Petitioner Graseck (hereinafter "Graseck") worked for the Legal Aid Society (hereinafter "the Society") as a staff attorney in its Criminal Division from July 12, 1971 to October 13, 1972. In October, 1971, he was assigned to the District Court Bureau in Hauppauge, Long Island and remainded there until his dismissal on October 13, 1972. E. Thomas Boyle, Attorney-in-Charge of the District Court Bureau from October 1971 to August 1972, served as his immediate supervisor. Ralph Costello replaced Boyle in this position in August, 1972, and was Graseck's supervisor until October 13, 1972.

On October 13, 1972, respondent Middelmiss, Attorney-in-Charge of the Society, met with Costello. Middlemiss requested petitioner to resign, setting forth the grounds for the request. Graseck informed Middelmiss that he refused to resign and that he needed the weekend to consider it. Middelmiss then discharged him.

E. Thomas Boyle met with Middlemiss a few days later protesting Graseck's discharge and urging his reinstatement. When Middlemiss refused to rehire him, Boyle resigned in protest.

On November 15 the Personnel Committee of the Society conducted a hearing to review Graseck's termination, particularly the charge leveled against the Society by him and Boyle that judicial pressure provoked the decision. Graseck was notified of the meeting. The first part of the meeting was open to the public; former clients of Graseck testified on his behalf. The balance of the meeting was held in private among the five members of the Personnel Committee, Boyle, Costello, Middlemiss and Graseck.

In the private meeting the four attorneys presented their positions to the Committee. Graseck presented his and submitted exhibits in support thereof; Boyle spoke on Graseck's behalf. Based upon all the evidence presented, the Committee voted four to one to uphold the decision of defendant Middlemiss to dismiss. Graseck was apprised of the Committee's affirmation on the day of the hearing. On January 24, 1973, the Board of Directors of the Society reviewed the dismissal and sustained the decision of the Personnel Committee. Graseck was not informed of this meeting nor was he present.

At the trial voluminous oral and documentary evidence was presented, including the reasons for the termination.

The incidents which culminated in Graseck's dismissal as found by the Trial Court in his findings of fact, and adopted by the Circuit Court are the following:

(a) The Mottenburg Incident

(b) The Kuzmier, Lardner and Elliott Incidents

(c) The Subpoena Incident

(d) The McElhiney Affirmation

(e) The Article 78 Proceeding Against Judge Tisch

(f) The Pen Incident

(g) The Volz Incident

(h) Lending of Minutes Without Permission

(i) Absence from Assigned Parts

(Pet. App. B11-B20)*

* Page references preceded by "Pet. App." refers to the Appendices filed by Graseck in connection with his Petition for a Writ of Certiorari. The letter "A" preceding a page number refers to the opinion below of the United States Court of Appeals for the Second Circuit and the letter "B" preceding a page number refers to the opinion below of the United States District Court per Chief Judge Jacob Mishler.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

The concurrent findings of fact of both lower courts that the plaintiff-petitioner was discharged "due to his inability to work with colleagues and to follow established rules, his repeated exercise of poor judgment, and his continual absence from assigned areas" must be upheld by this Court absent a "very obvious and exceptional showing of error".

In a case such as this where the Court of Appeals has affirmed the findings of fact of the District Court, this Court has long held:

> "A court of law, such as this Court, rather than a court for correction of errors in fact finding, cannot undertake to review *concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.*" (citations omitted) (emphasis added). *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

This "two court rule" has recently been reaffirmed by *Berenyi* v. *Immigration and Naturalization Service,* 385 U.S. 630 (1967); *United States* v. *Ceccolini,* —— U.S. ——, 98 S.Ct. 1054, 1058 (1978); and *Memphis Light, Gas & Water Division* v. *Craft,* —— U.S. ——, 98 S.Ct. 1554, 1564 (1978). *See also, Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.,* 321 U.S. 275 (1944); *United States* v. *Commercial Credit Co., Inc.,* 286 U.S. 63, 67 (1932); *United States* v. *Dickenson,* 331 U.S. 745, 751 (1947); *Faulkner* v. *Gibbs,* 338 U.S. 267, *rehearing den.* 338 U.S. 896 (1949).

The parties are not in substantial disagreement as to the basic facts surrounding Graseck's discharge. Gra-

seck, however, urges the conclusion that "[t]he chronology of events clearly demonstrates that the discharge decision was a response to extraordinary judicial communication to respondent Society", (Petition at 44)* and therefore his dismissal resulted "in [an] infringement of petitioner's and his clients' constitutionally protected rights under the First and Sixth Amendments, respectively, and was violative of the due process clause of the Fourteenth Amendment". Petition at 11-12.

After a full de novo trial** the District Court rejected these contentions finding that:

> "A careful review of the record discloses that plaintiff was discharged for a manifest inability to function within the organizational framework of the Society. The evidence amply demonstrates that plaintiff was unable to work with colleagues, to adhere to elementary rules and procedures of the Society and the District Court, and to exercise the degree of sound judgment that is necessary when presenting a case before the court. During the twelve month period of his employment . . . plaintiff was unwilling to work as a member of a team, but rather consistently performed according to his personal concept of his position. The incidents which culminated in plaintiff's dismissal might, when viewed singly, seem insignificant; however, when regarded in the aggregate, they unequivocally support the Society's contention that plaintiff's conduct impeded its proper functioning and reflected adversely on its good name." Pet. App. at B19-B20

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* Page references preceded by the word "Petition" refer to Graseck's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

** The transcript of the trial before Judge Weinstein was admitted into evidence in the trial before Chief Judge Mishler.

Holding that "[t]he district court's findings regarding the events underlying the dismissal decision are not clearly erroneous and find support in the record" (Pet. App. at A16), the Court of Appeals stated that:

> "The district court found that appellant was discharged due to his inability to work with colleagues and to follow established rules, his repeated exercise of poor judgment, and his continued absence from assigned areas . . . [and] that the discharge, far from being a reaction of judicial pressure resulted from the independent managerial decision of the Society." Pet. App. at A7

In their well reasoned opinions, both lower courts fully reviewed all the relevant and material facts surrounding petitioner's dismissal. Graseck, represented by able counsel before the lower courts, does not allege that he was precluded in fully developing the facts to support his position. Nor does his petition raise any new facts not presented to the trial court. He contends that the lower courts erred in their findings, yet he does not provide a standard by which this Court is to review those concurrent findings. While he disagrees with the conclusions of the lower courts as to the reasons for his discharge, Graseck completely fails to make the "very obvious and exceptional showing of error" which is required if this Court is to distribute the concurrent findings of the lower courts.

POINT II

In dismissing Graseck as a Legal Aid attorney, the Legal Aid Society did not act under "Color of State Law" within 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

In order to state a cause of action under 42 U.S.C. §1983, Graseck must establish first, that the appellees-respondents (hereinafter collectively referred to as "the Society") acted ". . . under color of any statute, ordinance, regulation, custom, or usage of any State or Territory. . .",* and second he must prove that the Society deprived him of a right, privilege or immunity secured by the Constitution and laws of the United States.

The Legal Aid Society of Suffolk County, New York is a private membership corporation created and organized under Article 2 of the Membership Corporation Law of the State of New York. The Society is independent of any *de facto* or *de jure* state or local regulatory authority. It is governed by a private Board of Directors elected by the general membership. Article IV of the Society's By-Laws provided that "[t]he management of the affairs, property, business and operation of the society is vested in a Board of Directors". Pet. App. at B24 n. 6.

At all relevant times, no member of the Board of Directors was a public official. No public official automatically becomes a member of the governing Board of Directors by virtue of his or her public office. The Society was under a private contract with the County of Suffolk to represent indigent persons charged with a crime in accordance with the County's obligation pursuant to Article 18-B, §722 of

* The phrase "state action" is used interchangeably with the phrase "under color of 'state law' ". *United States* v. *Price*, 383 U.S. 787, 794 n. 7 (1966).

the County Law of the State of New York. The contract is renewed annually. The County, if it so desired, could choose not to renew the contract.

The private nature of the Society has clearly been recognized by the New York State legislature in enacting Section 722 of the County Law, which gives the County the option of using either a "*public* defender" system or a "*private* legal aid bureau or society" to represent indigent criminal defendants. (emphasis added). The mere fact that Section 722 of the County Law authorizes the County to employ a "private legal aid bureau or society" to represent indigent criminal defendants does not by any stretch of the imagination transform the Society into a "public" entity, *cf. Buck* v. *Board of Elections of City of New York*, 536 F.2d 522 (2d Cir. 1976).

Although he does not dispute the private nature of the Society, Graseck urges that relationship between the Society and Suffolk County is such that his dismissal by the Society constitutes an act of the State. In rejecting Graseck's position, both courts below found that his dismissal was, in the words of the Court of Appeals, the result of the Society's ". . . own independent evaluation of its needs, rather than at the behest of the state judges". Pet. App. at A37 (footnote omitted).

The facts of this case are virtually identical to those in *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971), which held that the firing of an attorney employed by the Legal Aid Society did not constitute state action under 42 U.S.C. §1983.* As observed by the Court of Appeals in the instant case,

* *See also*, *Wallace* v. *Kern*, 481 F.2d 621 (2d Cir. 1973), *cert. den.* 414 U.S. 1135 (1974).

"[t]he similarities between *Lefcourt* and the facts before us are, not surprisingly, striking. The bylaws of both societies are almost identical, . . . their respective contracts were made pursuant to the same New York Law requiring the State to implement a plan for furnishing counsel to indigent defendants, . . . they both receive substantial governmental funding (although the Society in *Lefcourt* evidently received some funds for its criminal division from private sources), they are both housed in governmental buildings, and, *most importantly,* there is no formal mechanism through which any government entity can exercise control or supervision over the internal operations of the societies." (footnote omitted) (emphasis added) Pet. App. at A21-A22. *See also,* Pet. App. at B33-B34, B43-B44.

Graseck ". . . has failed to establish that . . . [Suffolk County] or any other governmental subdivision or agency had any right whatever to intervene in any significant way with the affairs of the Society with respect to its employment practices or otherwise". *Lefcourt, supra,* at 1155.

Attempting to distinguish *Lefcourt, supra,* from the instant case, Graseck states that the Society in *Lefcourt* ". . . received considerable private financing [in the criminal area] and had maintained a healthy private existence long before it sought governmental assistance" compared to the activities of the criminal bureau of the Society in the instant case which was exclusively funded by Suffolk County. Petition at 69-70. This fact and other "minimal courtesies" (Pet. App. at A23 n. 20) cited by Graseck in an attempt to take the instant case out of the *Lefcourt* decision and into the area of state action were considered and, in effect, dismissed by the Court of Appeals as immaterial. Pet. App. at A22-A23.

Graseck further argues that the Court of Appeals erred in refusing to find state action in spite of the existence of a symbiotic relationship which existed between the state and the Society. According to Graseck, the Court of Appeals focused ". . . almost exclusively on the nexus approach to analyzing the state action issue set forth in Jackson [*Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974)] [and] made only a passing and confusing reference to the *Burton* [*Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961)] mode of analysis. . . ." Petition at 55.

According to Graseck,

". . . a mutually beneficial relationship, such as the one existing between the State and Respondent Society, is the cornerstone of the symbiotic relationship contemplated by *Burton.* The symbiotic nature of their relationship is apparent from the fact that Legal Aid engaged in the constitutionally mandated service of providing legal assistance to indigents and plays a central role in the management of the Court's congested criminal calendar in exchange for exclusive funding of its operation by Suffolk County and the performance of administration favors by the Court." (footnote omitted) Petition at 58-59.

Each of these points was considered by the lower court in arriving at its decision against finding state action.

The Court of Appeals found that a symbiotic relationship, required by *Burton* v. *Wilmington Parking Authority, supra,* for a finding of state action, did not exist.

"We have held that the relationship between the state and a private authority may be so extensive that the actions of the ostensibly private institution will fall within the ambit of state action, even in the absence of

direct state involvement in the challenged activity [citations omitted]. Not unmindful of the close working relationship here, we believe that the absence of governmental participation, let alone of "substantial" participation, in the Society's general management and internal operations *precludes a finding in this case of the degree of pervasive interdependence or partnership contemplated by Burton.*" (emphasis added) Pet. App. at A28-A29 n.22.

Contrary to Graseck's assertion, the Second Circuit considered and refused to find a symbiotic relationship. Of great, if not singular, importance to the court was the absence of governmental participation in the Society's general management and internal operations. *Compare, Braden* v. *University of Pittsburgh,* 552 F.2d 948, 960 (3d Cir. 1977); *Greco* v. *Orange Memorial Hospital Corp.,* 513 F.2d 873, 877 (5th Cir. 1975), *cert. den.* 423 U.S. 1000 (1975), finding no state action under *Burton* analysis where the board of directors had the ultimate authority in determining hospital policy, notwithstanding a mutually beneficial relationship between the county and the hospital, with *Downs* v. *Sawtelle,* 574 F.2d, 1, 7 (1st Cir. 1978), *cert. den.* —— U.S. ——, 99 S.Ct. 278 (1978), relied upon by Graseck (Petition at 57), finding state action under the *Burton* analysis for the purpose of section 1983 in which the court stated: "The most compelling factor is the power of the [Town of] Milo selectmen to appoint the hospital's [entire] board of directors."

The fact that the Society is engaged in providing constitutionally mandated legal services does not mean that it is fulfilling a "public function" so as to require a finding of state action. This "public function" argument was rejected in *Lefcourt* v. *Legal Aid Society,* 445 F.2d 1150, *supra.* Traditionally the defense of persons, indigent and as well as the non-indigent, has been provided by private attorneys. As noted by this Court in *Flagg Brothers, Inc.* v. *Brooks,* —— U.S. ——, 98 S.Ct. 1729 (1978), a primary feature of the public function doctrine is exclusivity. It cannot be seriously contended that the defense of those accused of crimes has been "traditionally an exclusive public function", *Flagg, supra,* at 1735-36, or that the Society has had some power delegated to it by the State which is "traditionally associated with sovereignty". *Id.* at 1733. *Accord, Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, *supra. See, Weise* v. *Syracuse University,* 522 F.2d 397 (2d Cir. 1975); *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137, 1140 (2nd Cir. 1973).

Nor does the fact the Society's criminal division was exclusively funded by public moneys sufficient to require a finding of state action.

The mere receipt of state moneys, without a "nexus" between the funding and the challenged activity has been held to be insufficient to warrant a finding of state action. *Schlein* v. *Milford Hospital, Inc.,* 561 F.2d 427 (2d Cir.); *Weise* v. *Syracuse University, supra; Barrett* v. *United Hospital,* 376 F.Supp. 791 (S.D.N.Y. 1974), *aff'd.* 506 F.2d 1395 (2d Cir. 1974); *Grossner* v. *Trustees of Columbia University,* 287 F.Supp. 535 (S.D.N.Y. 1968); Pet. App. at B33.

Graseck's attempt to distinguish *Lefcourt* v. *Legal Aid Society,* 445 F.2d 1150, *supra,* on the grounds that in *Lefcourt* the Society received "considerable private financing" (Petition at 70) was considered by the Court of Appeals in arriving at its decision. Pet. App. at A22. There is moreover no evidence in the record that indicates the amount of private financing the Society received in *Lef-*

court or that would sustain Graseck's claim that it was "considerable".

Braden v. *University of Pittsburgh*, 552 F.2d 948, *supra; Downs* v. *Sawtelle*, 574 F.2d 1, *cert. den.* —— U.S. ——, 99 S.Ct. 278, *supra;* and *Holodnak* v. *AVCO Corp., AVCO-Lycoming Division, Stratford*, 514 F.2d 285 (2d Cir. 1975), *cert. den.* 423 U.S. 892 (1975), relied upon by Graseck to support a finding of a *Burton*[•] symbiotic relationship between the Society and the State are easily distinguishable from the present case.

In *Braden, supra,* the court, in affirming the lower court's denial of defendant's motion to dismiss the complaint, pointed out that the state was deeply enmeshed in the operations of the University, including but not limited to its financing *and its basic decision making processes. Id.* at 959. Prior to the passage of the "University of Pittsburgh-Commonwealth Act", the university had been a private institution. The State, not content with merely providing funds to the ailing institution, required a comprehensive restructuring of the university to reflect the needs of the State. Especially damaging to the defendant university was the fact that the University of Pittsburgh-Commonwealth Act provided that the university was established as an "instrumentality of the Commonwealth to serve as a State-related institution. . . ." *Id.*

[•] Although it is undisputed that *Burton* survives *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357, *supra,* the *Burton* court itself, in limiting the ambit of that decision, stated:

> ". . . what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Burton* v. *Wilmington Parking Authority*, 365 U.S. at 726 (1961).

As previously explained, the court in *Downs, supra,* relying almost exclusively upon the fact that the entire board of directors of the hospital was appointed by public officials, found state action with respect to the hospital. By comparison, the board of the Society is elected by the Society's general membership and at no time did any public official serve on the board nor did public officials automatically become members of the board by virtue of their office. *Holodnak, supra,* in which the court, using the *Burton* approach, found state action, involved a privately owned corporate defendant, whose buildings were owned by the federal government and located on government owned land, most of the equipment used was owned by the government, a large proportion of the work performed at the plant was under contract with the government which maintained a substantial task force there to ensure compliance and quality and production control.

The fact is that the Society, as a private entity, is under contract with Suffolk County to perform certain services not traditionally or, prior to the contract, exclusively performed by the State. As in any contractual arrangement, both parties thereto derive mutual benefits. Finding a *Burton* symbiotic relationship here, without more, thereby requiring a finding of state action would in effect require finding virtually every private entity contracting with a state entity subject to state action. This position is not only untenable and undesirable, it goes far beyond the established precedent of this court.

Having failed to find the *Burton* symbolic relationship urged by Graseck, the Court of Appeals proceeded to apply the analysis set forth in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, *supra,* with respect to the

> ". . . crucial question [as to] whether the actions of Judges Mauceri and Green, and in particular their

communications with Graseck's supervisors, provided sufficient involvement in the discharge to distinguish *Lefcourt* and render the conduct of the Society that of the State." Pet. App. at A23-A24.

Stressing his characterization of the "virtual monopoly status" the Society has in Suffolk County, as the provider of criminal defense services to the indigent (Petition at 72-73), Graseck, states that ". . . this Court indicated that a sufficient '. . . relationship between the challenged actions of the entities involved and their monopoly status. . .' *might* render appropriate a finding of state action". (emphasis added) Petition at 74-75. This Court in *Jackson, supra,* said, however, that a *monopoly status is not determinative* of whether the action constitutes state action for the purposes of the Fourteenth Amendment.

> ". . . [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351.

As the Second Circuit Court of Appeals aptly stated in *Powe* v. *Miles,* 407 F.2d 73, 81 (2d Cir. 1968),

> ". . . the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint."

Rejecting Graseck's assertion that his discharge was in direct response to judicial pressure imposed on the Society, the Court of Appeals relied on the conclusion of Judge Weinstein who, in dismissing the complaint against the

state judges, ". . . found totally lacking any evidence that they encouraged or even desired discharge." Pet. App. at A25.

Conceding that the conflicts between Graseck and the judges were among the factors which prompted the Society's decision to discharge Graseck and therefore there was an attentuated casual connection between the judges' conduct and the action taken by the Society, (Pet. App. at A29), the lower court concluded that

> "[o]ur review of the three incidents deemed crucial by appellant convinces us that the limited nature of the judges' conduct complained of precludes a finding of state action" *Id.* at A31.
>
> . . .
>
> "It is not the effect alone that government conduct has on private actions which establishes the governmental character of the private action. Rather it is the degree of government influence and control over the private entity, and in particular over the decision itself that is determinative." (footnote omitted) *Id.* at A34.
>
> . . .
>
> "In sum, we agree with the district court that the Society initiated the dismissal based on its own independent evaluation of its needs, rather than at the behest of the state judges" (footnote omitted) *Id.* at A37.

Graseck's further contention that the Society's ". . . virtual exclusive control over the funds for the defense of indigent criminal defendants . . . enables it to restrain its staff from engaging in the vigorous representation to which clients are entitled pursuant to the Code of Professional Responsibility and in accordance with the Sixth Amendment" (Petition at 73) finds no basis in the record. No

evidence was offered that the Society restrained its staff from engaging in the vigorous representation of its clients. With respect to Graseck, the District Court found that:

> "Plaintiff offers no proof that the Society's actions were motivated by a desire to impede or interfere with his representative duties. At no time during his employment was plaintiff ever instructed how to try a lawsuit or how to defend an indigent client whom he has assigned to represent. Nor was plaintiff ever restricted by his supervisors in the execution of his duty to represent an indigent criminal defendant within the bounds of the law.
>
> Plaintiff's claim, though theoretically correct, is unsupported by the evidence. A study of the record reveals that the decision to discharge plaintiff was not made because he was attempting to obtain evidence useful in cross-examination, or seeking to vindicate his client's right to a speedy trial, or attempting to communicate with a client." Pet. App. at B42.

The flexible approach adopted by the Court of Appeals in state action cases by requiring a higher degree of state involvement in non-race discrimination cases before finding state action than it requires in race discrimination cases is not unique to the Second Circuit. *Jackson* v. *Statler Foundation,* 496 F.2d 623, 628-29 (2d Cir. 1974); *Weise* v. *Syracuse University,* 522 F.2d 397, 406 (2d Cir. 1975); *Taylor* v. *Consolidated Edison Co. of New York, Inc.,* 552 F.2d 39 (2d Cir. 1977) *cert. den.* 434 U.S. 845 (1977); *Compare, Coleman* v. *Wagner College,* 429 F.2d 1120 (2d Cir. 1970); *Powe* v. *Miles,* 407 F.2d 73, 82-83 (2d Cir. 1968); *Wahba* v. *New York University,* 492 F.2d 96 (2d Cir. 1974), *cert. den.* 419 U.S. 874 (1974); *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137 (2d Cir. 1973); *Lefcourt* v. *Legal Aid Society,* 445 F.2d 1150, 1155 n. 6 (2d Cir. 1971).

See, Taylor v. *Consolidated Edison Co. of New York, Inc., supra* at 43 stating that a lighter burden may also be applicable to sex discrimination cases. For cases in other circuits *see, Granfield* v. *Catholic University of America,* 530 F.2d 1035, 1046 n. 29 (D.C.C. 1976), *cert. den.* 429 U.S. 821 (1976); *Greco* v. *Orange Memorial Hospital Corp.,* 513 F.2d 873, 879 (5th Cir. 1975), *cert. den.* 423 U.S. 1000 (1975); *Turner* v. *Impala Motors,* 503 F.2d 607, 611 (6th Cir. 1974); *Fletcher* v. *Rhode Island Hospital Trust National Bank,* 496 F.2d 927, 931 (1st Cir. 1974), *cert. den.* 419 U.S. 1001 (1974); *Adams* v. *Southern California First National Bank,* 492 F.2d 324, 334-35 (9th Cir. 1973), *cert. den.* 419 U.S. 1006 (1974).*

As the court explained in *Taylor* v. *Consolidated Edison Co. of New York, Inc.,* 552 F.2d 39, 42, *cert. den.,* 434 U.S. 845 (1977), *supra,*

> "[b]ecause of the generally recognized anathematic status of any government-sponsored racial discrimination, for instance, we have held that a lesser degree of state involvement is needed to meet the state action requirement in cases alleging such discrimination. [citations omitted] . . . ."

In explaining the rationale underlying the difference in standards used in state action cases, the court in *Greco* v. *Orange Memorial Hospital Corp., supra,* stated:

> "The doctrine of state action developed primarily in the area of racial discrimination. [citation omitted] The concepts developed in this area, explicitly sup-

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* Graseck's only cited authority to the contrary is the First Circuit case of *Downs* v. *Sawtelle,* 574 F.2d 1 (1st Cir. 1978), *cert. den.,* —— U.S. ——, 99 S.Ct. 278 (1978), which involved an action against a hospital but did not involve racial discrimination. Finding state action, the court, in dicta, observed that it had in an earlier case expressed *reservations* as to the flexible approach used in the Second Circuit. *Id.* at 6 n. 5.

ported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. *The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas inaffected by racial considerations has led the courts to define more precisely the applicability of the state action doctrine.*" (emphasis added).

The Circuit Court approved the District Court's use of the higher standard in the instant case stating that the ". . . less stringent state action standard utilized in racial discrimination cases is inapplicable here". Pet. App. at A19-A20, n. 17.

Graseck's reliance upon the recent decision in *University of California Regents* v. *Bakke,* —— U.S. ——, 98 S. Ct. 2733 (1978), is taken out of context and totally misplaced. *Bakke* involved a "quota" system used by the University which gave admission preference to members of minority groups. It was in that context that the Court's statement, relied upon by Graseck, that ". . . there are serious problems of justice connected with the idea of preference itself," *Bakke, supra,* at 2752, was made. The preference referred to in *Bakke* dealt with preference in favor of one racial group over another. It did not refer to the standards used in different state action cases.

Although not presented to the Court of Appeals for its consideration, Graseck further urges that even if the higher standard is applied, ". . . this case does have significant racial implications". Petition at 64. That racial implications may be involved (a suggestion the Society vigorously resists) does not *ipso facto* mean that the standard applied to state action involving racial discrimination has been met.

More importantly for this case, there is absolutely no evidence in the record showing the racial composition of the indigent clients of the Legal Aid Society of Suffolk County who are accused of crimes. Nor did Graseck attempt to introduce such evidence at either trial. His assertion that "[i]t is apparent that racial minorities are over-represented . . . as clients of such free legal assistance programs as that respondent Society contracts to provide . . . ." (Petition at 67-68) finds no support in the record. Obviously raised as an afterthought, this claim should be dismissed.

POINT III

There is no proof in the record to support a finding that the refusal of the courts below to find that Graseck's dismissal was the result of state action will permit evasion of the Sixth Amendment duty to provide effective legal representation to the indigent.

Graseck asserts that the refusal of the Court of Appeals to find his dismissal was the result of state action on the part of the Society could seriously undermine the special protection afforded under the Sixth Amendment. By refusing to find that his dismissal was the result of state action will, he asserts, provide a loophole which will make possible evasion of the Sixth Amendment duty to provide effective counsel to indigents. Petition at 75-76.

No proof was offered at either trial to support Graseck's position. And as discussed above, the District Court specifically found that Graseck himself was never restricted by his supervisors in fully and effectively representing the Society's clients within the bounds of the law. Pet. App at B42. Although the conclusion urged by Graseck is theoretically possible, it is, in this case, purely hypothetical and speculative given the fact that there is nothing in the

record developed before the courts below to support his position even if this court were inclined to consider the issue.*

The implication of Graseck's position is that any communication by a judge to the supervisors of an attorney responsible for providing counsel to the indigent which reflects adversely upon the attorney will undermine the Sixth Amendment rights of the indigent.** The logical conclusion of this position would preclude a judge from ever commenting upon the performance of attorneys such as those employed by the Society who represent the indigent. Not only would this result, as a matter of policy, be highly undesirable if not absurd, it would directly contradict subsection (B)(3) of Canon 3 of the Code of Judicial Conduct of the American Bar Association adopted August 16, 1972 which provides:

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* Consideration of this issue might well require this Court to consider the standard to be used in determining whether there has been adequate and effective representation by counsel. The standard applied in the Second Circuit is whether the attorney's conduct was ". . . of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice". *United States* v. *Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. den.* 338 U.S. 950 (1950). *Accord, United States* v. *Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974).

** Graseck's position apparently is that attorneys representing the indigent must be completely insulated from the judiciary.

It can be argued that the attorneys employed by the Society are less subject to the influence of the State judiciary than public defenders who are directly employed by the government. *See*, N.Y. County Law §716, authorizing the board of supervisors of a county to designate the public defender. Federal Public Defenders are appointed by the judicial council of the circuit. 18 U.S.C. §3006A(h)(2)(A). *See, United States* v. *Robinson*, 553 F.2d 429 (5th Cir. 1977), *cert. den.* 434 U.S. 1016 (1977), holding that where defendant had failed to show prejudice, he was not deprived of constitutional right to counsel merely because his attorney was employed by the federal government as a federal public defender. *See also, United States ex rel. Reed* v. *Richmond*, 277 F.2d 702 (2d Cir. 1960); *Espinoza* v. *Rogers*, 470 F.2d 1174 (10th Cir. 1972).

> "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.
>
> *Commentary:* Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body."

As stated by Judge Weinstein in the first trial of this action,

> "[i]t's the duty of judges to observe lawyers before them, bring to the lawyers' attention defects that they see in their work and where they see, to bring it to the attention of the lawyers or if they are lawyers, to the Bar Association or others." Pet. App. B28.

This is much too difficult and important an issue to decide in the abstract based upon hypothetical speculation. Even if this Court were to take it under consideration, there is nothing in the record from which even an inference could be drawn to support the finding urged by Graseck.

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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